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Bothersome Boulevard's

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BOTHERSOME BOULEVARDS*

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It is almost inevitable that automobiles on Maryland highways should have created the unwieldy accumulation of case law now extant. Motor vehicles themselves are powerful, potentially dangerous instruments, operated by persons of differing degrees of capacity and experience, moving in close quarters at high speeds. The comparative safety of the highway is a real tribute to the basic mechanical aptitude of the American. Still, accidents occur, and litigation follows. The variety of circumstances under which vehicles can collide, added to the sheer volume of vehicles and, consequently, of collisions, has produced so formidable a body of decisions that automobile negligence law has become almost a specialty within itself.

With such a volume of cases, there is always a danger that the underlying continuity of philosophy may be lost or that there may arise an easy cataloguing of situations which obscures the basic legal rationale. Inevitably, successive decisions refine originally simple rules and compel re-examination of fundamental concepts. The so-called Boulevard Rule seems to have reached this condition, and this article is an attempt at such a re-examination.[1]

This study must start with a warning. The Boulevard Rule is limited in its application, and the first question always must be whether there is truly a "boulevard" case. Furthermore, if there is a "boulevard" case, then there will always be a "favored" driver, who by definition is on the "boulevard," and an "unfavored" driver, who by definition is not. Thus, in considering decisions, an independent first determination must be made of the status of each driver and the respective ruling as to each under the Boulevard Rule, without regard to primary negligence, contributory negligence, or even last clear chance. Obviously, in the particular case, liability or lack of liability follows, dependent on ordinary principles of primary negligence, absence of contributory negligence, and the applicability of last clear chance. All this may be stating the obvious, but decisions in the "boulevard" field are not easy for analysis. At least two drivers are always involved, frequently with a third party suing both, and this seems to give rise to some confusion in the application of precedent.

The fact that a comprehensive grasp of the Boulevard Rule is proving difficult to those who toil in the field of automobile negligence

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1. While this article attempts to consider all the material decisions dealing with this limited area, it does not refer to or cite all the so-called boulevard cases, or the related decisions which are cited therein. The decisions cited are those which seem relevant to boulevard law in its present state, with a caveat to those that seem superceded, if not reversed.

law is undoubtedly due in part to its nomenclature, because the "boulevard" to which the Rule refers is no longer a "boulevard" as we commonly use the term. In addition, there is a basic contradiction between the elementary rules of negligence law and the judicial justification of the so-called Boulevard Rule which inevitably must lead to confusion. Before considering the possibility of dispelling the fog, it is necessary first to establish what the Boulevard Rule is and how it is presently applied.

APPLICATION OF THE "BOULEVARD" RULE

The limited aspect of automobile negligence law to which the "Boulevard Rule" applies has now been defined by the Maryland Court of Appeals with considerable precision: It applies only where there is a collision between two vehicles when two physical factors are both present.

First — *Boulevard:* There must be a favored street or highway and an unfavored intersecting highway, street or private road on which traffic is required to stop, either by a traffic control device or by law, and to yield right of way to traffic approaching on the favored highway (or in the case of a "yield" sign, merely to yield right of way).

Second — *Entrance:* The collision must occur as a direct consequence of the entrance of a vehicle onto the favored highway in disregard of its obligation to yield the right of way.

The rule applies to more than four-wheeled motor vehicles.[2] It has been applied to motorcycles,[3] bicycles,[4] a horse and wagon[5] and a tractor-drawn farm rig.[6] On the other hand, it does not apply to a pedestrian.[7]

The Boulevard Rule does not apply at an intersection where there is neither a traffic control device nor statutory requirement compelling the unfavored vehicle to stop and yield right of way. These uncontrolled intersections are controlled by the "car on the right" rule.[8] Under some circumstances, the first car in such an intersection may still have the common law right of way.[9] The rule also does not apply to a turn off a boulevard,[10] even though such a turn may be a left turn across oncoming traffic at an intersection, where the turning driver has a statutory duty to yield right of way under section 232 of the Motor Vehicle Law.[11]

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2. MD. CODE ANN. art. 66½, § 184 (1957).
3. Simco Sales Service v. Schweigman, 237 Md. 180, 205 A.2d 245 (1964).
4. Kane v. Williams, 229 Md. 59, 181 A.2d 651 (1962).
5. Fowler v. De Fontes, 211 Md. 568, 128 A.2d 395 (1957).
6. Shriner v. Mullhausen, 210 Md. 104, 122 A.2d 570 (1956), noted in 17 MD. L. REV. 68 (1959).
7. Folck v. Anthony, 228 Md. 73, 178 A.2d 413 (1962).
8. MD. CODE ANN. art. 66½, § 231 (1957).
9. Rabinovitz v. Kilner, 206 Md. 455, 112 A.2d 483 (1955). See also Ghiradello v. Malina, 238 Md. 498, 209 A.2d 564 (1964).
10. Bricker v. Graceffo, 236 Md. 558, 204 A.2d 512 (1964).
11. Tates v. Toney, 231 Md. 9, 188 A.2d 283 (1963).

DEFINITION OF "BOULEVARD"

Against this background, some situations where there is a "boulevard" within the meaning of the Rule are readily recognized. The Motor Vehicle Law imposes on unfavored drivers the duty to stop at the entrance to a "through highway" and to yield right of way to vehicles approaching on the through highway.[12] By definition a "through highway" is one where vehicles on intersecting highways are required to stop and yield right of way and where stop signs are erected.[13] The same dual duty of stopping and yielding may also be imposed by a "stop" sign on an intersecting highway.[14] Local authorities, as well as the State Roads Commission, have the authority to designate "through highways" and to erect stop signs.[15] The more recently evolved "yield" sign has also created a "boulevard" situation, although there is no absolute duty to stop.[16]

The same duty to stop and yield right of way is imposed by statute on the driver entering a paved highway from an unpaved road, or from a private road or driveway.[17] Regardless of the nature of the favored highway under such circumstances, it is considered a "boulevard" under the Boulevard Rule.[18] Over the vigorous protest of Chief Judge Brune, the court has also found a red traffic light to create a "boulevard" for the driver with the green light.[19] The same result will also apply at the intersection where there is a flashing yellow light for traffic on the favored highway and a flashing red light for traffic on the unfavored highway, although both decisions involving this section have also involved a "stop" sign on the unfavored highway, which the court considered insignificant.[20]

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12. MD. CODE ANN. art. 66½, §§ 233(a), 242(c) (1957).
13. MD. CODE ANN. art. 66½, § 2(60) (Supp. 1965).
14. MD. CODE ANN. art. 66½, § 233(b) (1957).
15. MD. CODE ANN. art. 66½, §§ 191, 242(a) (1957), § 185(6) (Supp. 1965). There is an early case which holds that a stop sign erected under municipal ordinance, as opposed to state law, does not create a boulevard. McClenny v. Przyborowski, 182 Md. 95, 32 A.2d 365 (1943). While not specifically overruled, this distinction is certainly no longer meaningful in determining the duty of an unfavored driver, since local authorities are empowered now to erect traffic control devices. Such devices can create a boulevard situation.
16. MD. CODE ANN. art. 66½, §§ 2(60), 233 (Supp. 1965). Merritt v. Darden, 227 Md. 589, 176 A.2d 205 (1962).
17. MD. CODE ANN. art. 66½, § 234 (1957). There still seems to be an open question whether a driver entering a street from a public alley or other equivalent and obviously secondary way is required to stop and to yield right of way, in the absence of a stop sign. Section 208 of the Motor Vehicle Law requires such a stop, prior to driving onto the sidewalk from an alley, but the intent of this section, which also applies to private driveways and buildings, is to protect sidewalk pedestrians. Section 199, which is the comparable section with respect to roads and streets, requires a stop, whether a sign is present or not, only from unpaved public highways and private roads and driveways. If an alley is public and paved, therefore, there would appear to be no application of the Boulevard Rule to an entrance onto a street from such an alley in the absence of a stop sign.
18. Shriner v. Mullhausen, 210 Md. 104, 122 A.2d 570 (1956).
19. Eastern Contractors v. State, 225 Md. 112, 169 A.2d 430 (1961), noted in 23 MD. L. REV. 172 (1963). To the author of the present article, the interest of traffic flow justifies extension of the Boulevard Rule to the "green light" situation.
20. MD. CODE ANN. art. 66½, § 196 (1957). Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961); State v. Marvil Package, 202 Md. 592, 98 A.2d 94 (1953). Unresolved up to this point is the situation where there is a stop sign at the entrance to a

The long line of cases in which the Boulevard Rule has been applied make it clear that a "boulevard" may exist on any type of street or highway, major or minor, so long as the unfavored driver is required to stop and yield right of way before entering. In the vernacular, a "stop street" intersects with a "boulevard." The inherent contradiction in this terminology is that "boulevard" describes the road occupied by the favored driver; therefore, the existence of the "boulevard" would seem to depend on the character of the favored road as it appears to the favored driver. Actually, however, the existence of the "boulevard" is exclusively established by the control imposed on the unfavored driver and is really often known only to the unfavored driver.

Two decisions illustrate this point. *Houlihan v. McCall*[21] involved an intersection where roads *A* and *B* crossed; there was a stop sign for traffic on Road *A* on one side of the intersection, but not on the other side. No stop sign stood on either side of the intersection on Road *B*. Road *B* was held not to be a "boulevard" as to the driver who approached on Road *A* from the side where there was no stop sign. In *Nardone v. Underwood*,[22] a driver on dual U.S. Route No. 30, in southern Maryland, was not on a "boulevard" where there was no stop sign on an intersecting road.

These cases would appear to be in direct conflict with *Hickory Transfer v. Nezbed*.[23] In this case, a truck was traveling on Orleans Street in Baltimore, where lights were timed for steady traffic flow. One light was defective and seemed out of order to the trucker. It was, in fact, green for a car on the intersecting street, and truck and car collided. The court nonetheless held the truck to be on a boulevard and therefore favored. While there is a persuasive argument in support of this conclusion, based on a legislative policy of expediting arterial traffic, the *Hickory Transfer* decision must be regarded as overruled by *Nardone*.[24]

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highway under construction which has not yet been opened to public use. If a car fails to stop at the sign, and yield right of way to a vehicle (a contractor's truck, for example) on the unopened road, does the Boulevard Rule apply? The boulevard statutes and decisions test the highway status by the presence of a stop sign, and not the condition of the other road. The unopened condition of the favored road therefore would seem to make no difference.

21. 197 Md. 130, 78 A.2d 661 (1951).

22. 219 Md. 326, 149 A.2d 13 (1959).

23. 202 Md. 253, 96 A.2d 241 (1953).

24. In this case, the court seemed, without discussion, to assume that there could be a through highway without a stop sign or traffic control device being erected. Section 233(a) of the Motor Vehicle Law requires a stop at an entrance to a through street and a yielding of right of way to traffic on that street. Section 233(b) requires the same conduct at a stop sign. Section 242(a) permits the designation of through streets and imposes an obligation on the State Roads Commission (or local authorities) for erecting appropriate signs. Section 242(c) essentially duplicates Section 233(b). The court has never considered this statutory duplication meaningful, except to the extent that such a conclusion can be inferred from this decision.

Such a distinction as the court seemed to draw in the cited case does not strain the statute unduly, however, or the definition of through highway (section 2(60)), and is reasonable since it gives validity to the often-expressed legislative policy of expediting traffic by not requiring a driver on a genuinely through highway to slow at every intersection. It is not, however, the present law, and a stop sign, not apparent to the favored driver, creates a boulevard on which the favored driver may even ignore a "Slow — Dangerous Intersection" sign. Belle Isle Cab v. Pruitt, 187 Md. 174, 49 A.2d 537 (1946).

There is yet another dimension to be considered in the determination of whether a stop sign requires an apparently unfavored driver to stop and yield right of way. Section 189 of article 66½ of the Maryland Code (the Motor Vehicle Law) requires the State Roads Commission to adopt a manual and specifications for a uniform system of traffic control devices, and, under section 191, such devices must conform to the uniform system when placed by local authorities. The law requires stop signs to "be located as near as practical to the property line of the highway."[25] The Manual of Traffic Control Devices of the State Roads Commission requires such signs to be erected not closer than six feet nor more than fifty feet from the intersection. In *Belle Isle Cab Co. v. Trammell*,[26] the court had before it a situation of two converging streets, which were crossed at roughly right angles by another street at a point shortly before they merged. The triangle formed, with the merging streets as the two sides and the intersecting street as the base, was paved. There were stop signs for traffic on the intersecting street at each corner where it crossed the merging streets; however, there was no place to erect a stop sign for traffic in one direction on the intersecting street before it crossed the second of the merging streets, and no sign was posted. The court held that the driver on the intersecting street in this one direction had no duty to stop at the second merging street, because the one posted stop sign was more than the distance from this intersection prescribed by the Manual and hence did not control. Thus, the favored street was a "boulevard" from one side but not from the other.

The court later reached a similar result in a somewhat comparable case.[27] Here, there was a busy "Y"-type intersection between a major road and a secondary street. The curb lines of both streets had been extended across a paved area with paint to the point of actual meeting. Across the base of the painted triangle so formed was a painted vehicular way for turning vehicles. There was only one stop sign for vehicles on the secondary street, located some 100 feet from the point where the streets merged, but close to the turning passageway. The court held that by reason of the distance requirements of the Manual, the stop sign required a stop before crossing the turning passageway. Inferentially at least, this last decision holds that the stop sign did not control the entrance onto the principal thoroughfare. There was no obligation to yield right of way where the real hazard existed, then, and the sign controlled only a minor incident to the dangerous traffic.

The test, therefore, of when a "boulevard" exists is entirely dependent on whether either driver on intersecting roads (public or private) is required to stop and yield right of way to the other. This may not be easy to resolve (especially from the seat of the driver who has the problem), but if one has such a requirement, then the driver on whom such obligation is imposed is entering a "boulevard." Absent such requirement, there is no "boulevard." If there is no "boulevard," then there can be no application of the Boulevard Rule.

25. MD. CODE ANN. art. 66½, § 242(b) (1957).
26. 227 Md. 438, 177 A.2d 404 (1962).
27. Savage v. Mills, 237 Md. 204, 205 A.2d 239 (1964).

DEFINITION OF ENTERING

Once it is established that a "boulevard" is involved, there is a further condition which must be met before the Boulevard Rule can apply: the accident must occur as the unfavored driver is entering upon the "boulevard." The Motor Vehicle Law requires the unfavored driver to yield right of way, and he yields right of way by not entering the highway. Once he has safely entered, other rules apply.

Most cases arise from collisions that take place within the actual intersection of favored and unfavored streets. It is a mistake, however, to limit entering under the Boulevard Rule to an intersection. An intersection itself is defined in the Motor Vehicle Law as the area within the lateral boundary lines of intersectiong roads, if approximately at right angles, or otherwise the area where vehicles traveling on the intersecting roads may come in conflict.[28] Thus, the geographical bounds of such an intersection can be precisely drawn in every case. Where there is a dual highway with a median strip and an intersecting road, there is only one intersection and not two.[29]

It is apparent, however, that an unfavored car entering a favored highway has not really entered until the unfavored car has reached its proper lane of traffic and has attained the speed of the flow of traffic. Up to this point, the unfavored car can be considered as interfering with the right of way of the favored car. Obviously, therefore, "entering" within the Boulevard Rule cannot be confined to the bounds of an intersection.

The Court of Appeals has made this point clear in a series of cases, although there was at first some misconception of their holdings. Both the earliest cases[30] involved head-on collisions; in each, there was evidence that the unfavored car's entering onto the boulevard had precipitated an emergency reaction by the favored driver which resulted in the collision. Both also had evidence that the unfavored driver had safely gotten into his lane and that the accident would not have occurred except for negligence of the favored driver. The court held the jury must determine which version was correct; if the jury found that failure to yield right of way was a cause, then the unfavored driver was negligent. The next case in historic sequence involved a rear end collision, but there it was unclear whether the court failed completely to give credence to evidence that the unfavored driver cleared the intersection, or concluded instead that it did not matter where the impact occurred if the favored car was in fact blocked.[31] The issue was finally resolved with a flat statement that a collision outside the intersection does not bar the applicability of the Boulevard Rule, if in fact the collision was a result of a violation of the unfavored driver's duty to yield right of way.[32] Thus, the test for application of the Boulevard Rule is whether the accident has taken place while the

28. MD. CODE ANN. art. 66½, § 2(20) (1957).
29. Packer v. Hampden Transfer, 206 Md. 407, 111 A.2d 849 (1955).
30. Ness v. Males, 201 Md. 235, 93 A.2d 541 (1953) and Shaneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956).
31. Schwartz v. Price, 215 Md. 43, 136 A.2d 749 (1957).
32. McDonald v. Wolfe, 226 Md. 198, 172 A.2d 481 (1961).

unfavored driver is going through all the phases of entering the favored highway.

It now seems established that an unfavored car still within the intersection is conclusively presumed to be entering the highway Once the unfavored car has cleared the intersection itself, there will be a jury issue whether the accident occurred while it was entering the boulevard, unless, on the one hand, the evidence is conclusive that the accident did occur while entering, or, on the other hand, the evidence is conclusive that the unfavored car had successfully entered so that the unfavored driver had ceased to be a "perpetual pariah."[33]

POSITION OF THE UNFAVORED DRIVER

If the facts require application of the Boulevard Rule, the Motor Vehicle Law imposes on the unfavored driver an absolute duty to stop and an absolute duty to yield right of way. In fact, as discussed above, the existence of the dual duties is necessary for the Boulevard Rule to be applicable at all. If the unfavored driver has stopped, he has an opportunity to observe and to avoid any hazards that may exist on the road he proposes to enter. Not only the Motor Vehicle Law, but also his duty to avoid deliberately injuring others, compels him not to enter the favored highway if such entrance will expose others to harm. It follows under the reasoning of the cases that if his entry causes injury, it is a direct cause of such injury and is a breach of his duty to others.

This line of reasoning runs through every boulevard case where the legal position of the unfavored driver is considered. The decisions leave no question that if the Boulevard Rule is applicable, the unfavored driver is negligent, regardless of his excuse. Indeed, except in cases where there is a question of fact whether the accident took place during entry onto the boulevard, the unfavored driver in a boulevard situation is negligent as a matter of law.

Thus, an unfavored driver was contributorily negligent as a matter of law when he was struck by a racing car while crossing a boulevard, although there was positive evidence that the unfavored driver would have had adequate time to cross if the racing car had been approaching at a lawful speed.[34] A driver of a farm rig was negligent as a matter of law in crossing a boulevard — here, a secondary highway — from a farm lane, although the car which struck him was hidden from his view by the crest of a hill several hundred feet away.[35] A driver of an unfavored car was negligent as a matter of law in edging out into a blind intersection, even though there was no contact with the favored car, which was in a distant lane and which went out of control through the favored driver's efforts to avoid an expected collision.[36]

In other decisions, an unfavored driver was negligent as a matter of law in failing to stop as he moved to what he believed to be the

33. Grue v. Collins, 237 Md. 150, 205 A.2d 260 (1964).
34. State v. Gosnell, 197 Md. 381, 79 A.2d 530 (1951).
35. Shriner v. Mullhausen, 210 Md. 104, 122 A.2d 570 (1956).
36. Dunnill v. Bloomberg, 228 Md. 230, 179 A.2d 371 (1962).

proper stop line, when he collided with a favored car turning closely around a blind corner off the boulevard.[37] In another case, a trucker crossing a boulevard was negligent although the boulevard was, in his testimony, clear when he entered; he was struck in the rear by a car which admittedly had entered from a cross-street well within this trucker's range of vision, and undoubtedly after the trucker had started to cross.[38]

The sum of the decisions is that the unfavored driver enters the boulevard at his peril. If there is a collision, there may still be a jury question on whether his entrance was the cause, even if he has reached his proper lane and is in the flow of traffic.

Any thoughtful analysis of the Boulevard Rule must lead to the question whether the courts have not taken the motor vehicle statutes too far into the law of negligence. The Motor Vehicle Law, after all, is essentially a criminal code which is enforced by the state with criminal penalties. It applies to civil law only to the extent that it establishes a pattern of proper conduct. The law of negligence, on the other hand, is the civil law under which an individual finds redress for harm done to him by another. While every individual is entitled to assume that others will obey the law, it does not necessarily follow that violation of criminal law and civil liability must walk step-by-step indefinitely. There can be no basis for making civil law more stringent than its criminal counterpart, which is the present result in boulevard cases.

Generally, it is elementary in the law of torts that for every right, there is a corresponding duty. In automobile negligence law, the duty is upon every driver to observe and obey the motor vehicle law, and every other driver has the corresponding right to such observance and obedience. But also, in the law of torts, a person with a right is not ordinarily completely excused from some reciprocal duty to another, and the other is entitled to have this reciprocal duty respected as well.

Automobile negligence cases, however, rarely are considered in the light of reciprocal rights and duties, although the consideration is implicit in most. In the vast majority of the boulevard cases where the negligence of the unfavored driver is an issue, there can be no valid complaint against the equation: violation of the right of way law equals civil liability. The basic duty of every driver is to cause no harm to others by his conduct; obedience to the Motor Vehicle Law gives him the means of fulfilling that duty. With all these advantages, an accident occurring when the unfavored driver leaves his place of safety to enter the boulevard can only be a breach of his duty, directly caused by his positive action, and therefore an unassailable basis for civil liability as a matter of law.

There are, of course, variants on this situation. The example assumes that the unfavored driver can see oncoming traffic. There may be an entrance where his vision is blocked. He may move out into the favored highway under such circumstances, in an honest and careful attempt to see whether his way is clear, and in so doing cause a collision with a favored vehicle. Even though the unfavored driver can

37. Savage v. Mills, 237 Md. 204, 205 A.2d 239 (1964).
38. Brown v. Ellis, 236 Md. 487, 204 A.2d 526 (1964).

see, his range of vision may be too limited for him to get into the flow of traffic successfully; or, having begun his entrance, he may then see a favored vehicle which could avoid a collision with him if it were operated with reasonable care.

Certainly, there is persuasive equity in permitting the issue of the negligence of the unfavored driver to be submitted to the jury under such circumstances, rather than resolving it as a matter of law. The present state of the Boulevard Rule may reflect an unconscious and unspoken distrust by the court for the ability of a jury to weigh facts and apply legal principles objectively in a situation that cries for sympathy. On the other hand, the Motor Vehicle Law demonstrates a clear public policy in favor of the unimpeded flow of traffic, which it furthers by imposing barriers on unfavored vehicles which otherwise could impede the flow. This policy can justify stern treatment of even the cautious driver and supports the seemingly harsh decisions on the blind driver, if he causes an accident by failing, however innocently, to obey the law.[39]

There are essentially the same elements present in the traffic light cases, which are also now governed by the Boulevard Rule.[40] The statute requires vehicles facing a red light to stop; such vehicles, before starting after the light changes, must yield right of way to vehicles already lawfully in the intersection. A vehicle facing the green light must stop when it turns to amber, but if it cannot stop safely, then it may be driven cautiously through the intersection.[41] As with the stop sign situation, the unfavored vehicle facing a red light that shifts to green is in a position where its driver can see if the way is clear before he starts, and by simple inaction he can avoid all danger to others until the danger clears. The legislative policy mentioned above, and a further implicit policy of preventing accidents, justify harsh treatment of the unfavored driver who deviates from these duties.[42]

Up to this point, there has been another basic assumption, *i.e.*, that the favored driver was proceeding lawfully. Even if this is not true, however, there still is no justification for the accident-inducing conduct of an unfavored driver who does not have his vision blocked. He should never have left his place of safety in the face of visible unlawful operations by the favored driver. As the Maryland high court has repeatedly said, beginning with *Sun Cab v. Faulkner*,[43] the accident would never have occurred if the unfavored vehicle had yielded right of way.

For this reason, there can be no quarrel with two other seemingly harsh cases. In one, an unfavored driver was found contributorily

39. Savage v. Mills, 237 Md. 204, 205 A.2d 239 (1964); Dunnill v. Bloomberg, 228 Md. 230, 179 A.2d 371 (1962) and Shriner v. Mullhausen, 210 Md. 104, 122 A.2d 570 (1956).

40. Eastern Contractors v. State, 225 Md. 112, 169 A.2d 430 (1961).

41. MD. CODE ANN. art. 66½, § 193(b)(1) (1957).

42. Obviously, the color of the light and the position of vehicles at the time of light changes may create jury issues. The boulevard law is the law to apply once the jury has resolved these facts. Welsh v. Porter, 231 Md. 483, 190 A.2d 781 (1963). But the court has not hesitated to find an unfavored driver negligent as a matter of law. Baltimore Transit v. Presberry, 233 Md. 303, 196 A.2d 717 (1964).

43. 163 Md. 477, 163 Atl. 194 (1932).

negligent as a matter of law, although he was struck by a favored racing car.[44] The accident occurred at night, but the court noted the unfavored driver's ability to see oncoming lights two-tenths of a mile away. He was held to the responsibility of judging oncoming speed and stopping when he saw a collision was otherwise inevitable. This same duty of stopping in mid-passage was reflected in a later contributory negligence ruling[45] where a horse and cart projected themselves across a wide road and into the path of a favored car. In each of these cases, the court pointed to the opportunity of the unfavored driver, even after he had started his entrance, to avoid the collision, and his unseeing progress into peril.

There can, however, be circumstances where the vision of the unfavored driver is obscured and the favored car is unlawfully operated. For example, the unfavored car may be intending to turn right into a two-way favored street; it collides head-on with a car on the wrong side. Certainly the unfavored driver in such a case as this has a right to assume lawful operation of the favored car until he sees otherwise. It can be argued that this is an open question, but a recent case established a clear inference that the unfavored driver will be held negligent as a matter of law.

In the 1964 case of *Brown v. Ellis,*[46] a tractor-trailer entered an intersection when the favored street was clear for as far as could be seen. The distances involved strongly suggest that the truck could have crossed safely before any favored car, driven at a lawful speed, would have reached the intersection. The rear of the rig was nevertheless struck by a favored car that apparently had entered the street after the truck began to cross. Judgment on verdict for the defendant trucker was reversed. The trucker was held primarily negligent as a matter of law, but the case was remanded on the issue of contributory negligence of the favored plaintiff driver in not keeping a proper look-out. While the court commented in that case on the heavy duty of care borne by the driver of so ponderous and cumbersome a vehicle, the only conclusion that can be drawn is that the unfavored driver enters the boulevard absolutely at his peril. It is not necessary for there to be impact between the favored and unfavored vehicles.[47] It does not matter whether the impact takes place within the intersection.[48] If an accident ensues, as a matter of law it is at least in part due to the unfavored driver's negligence.

Brown v. Ellis makes it clear that a plaintiff favored driver may be barred from recovery by contributory negligence. Theoretically,

44. State v. Gosnell, 197 Md. 381, 79 A.2d 530 (1951).
45. Fowler v. De Fontes, 211 Md. 568, 128 A.2d 395 (1957).
46. 236 Md. 487, 204 A.2d 526 (1964).
47. Dunnill v. Bloomberg, 228 Md. 230, 179 A.2d 371 (1962).
48. Shedlock v. Marshall, 186 Md. 218, 46 A.2d 349 (1946) and Savage v. Mills, 237 Md. 204, 205 A.2d 239 (1964). Still undecided is the problem of the position of the unfavored driver who is involved in an accident with a car turning off the boulevard before the unfavored car has reached the intersection. The point was raised in *Savage v. Mills,* but not considered by reason of the court's determination of what constituted an intersection in that case. If the favored driver cuts the corner, however, and ignores the statutory requirement of leaving the intersection to the right of the center line of roadway being entered, then certainly the boulevard rule is not applicable. Francies v. Debaugh, 194 Md. 448, 71 A.2d 455 (1950).

the doctrine of last clear chance could also provide an escape from absolute responsibility for the unfavored driver. This classic doctrine requires primary negligence of a defendant, contributory negligence of a plaintiff, and then last clear chance of the defendant which excuses the plaintiff from the consequence of his contributory negligence. In boulevard cases, however, it appears that no requirement of establishing primary negligence should be postulated; there need be only the opportunity for the favored driver to avoid an accident after he knew, or should have known, that an accident would otherwise occur.[49] To establish such last clear chance after contributory negligence, there must be affirmative evidence of both knowledge and ability to avoid; such evidence is necessary to establish the required sequence of events.[50] At the same time, ever since *Greenfeld v. Hook*[51] the court has said that it will not be concerned in boulevard cases with "nice calculations of speed, time and distance."[52] It is significant that this was the last case of classic last clear chance. The court denies itself and, therefore, the unfavored driver the very evidence which might permit application of last clear chance to a boulevard case.

Actually, last clear chance does not usually enter boulevard cases because of the almost universal application of a concept of continuing negligence on the part of the unfavored driver. Such continuing negligence is concurrent with the last clear chance of the favored driver and contributory negligence as a matter of law. Last clear chance does not become an issue, as it requires a set sequence of events of which the act of contributory negligence is separate and not overlapping. For example, when the unfavored driver is able to avoid the accident by stopping after he has begun his entrance, and in the exercise of reasonable care should see the hazard, then his continuing progress into the path of danger constitutes an act of continuing negligence.

The court, however, makes no distinction between the situation where the unfavored driver is committed to a place of peril and continues to move in that position, and where he has an opportunity to stop before reaching the place of peril. Even where there is no evidence that the unfavored driver had an opportunity to avoid the accident after seeing the oncoming favored car for the first time, the court seems to apply the concept of continuing negligence.[53] To the extent that an unfavored driver can escape being held negligent, it would seem that he must have been stranded in the right of way by some circumstances beyond his control, such as mechanical failure. Even here there is a question whether this would do more than permit him to recover from the favored driver under the doctrine of last clear chance, which presumes that he remains contributorily negligent.

It is an inevitable conclusion from the above that the Maryland Boulevard Rule now seems to hold clearly that the unfavored driver is

49. *Cf.* Meldrum v. Kellam Distributing, 211 Md. 504, 128 A.2d 400 (1957), which is not a boulevard case.
50. Creighton v. Ruark, 230 Md. 145, 186 A.2d 208 (1962), also not a boulevard case.
51. 177 Md. 116, 8 A.2d 888 (1939).
52. See, *e.g.*, Brooks v. Childress, 198 Md. 1, 81 A.2d 47 (1951).
53. Brown v. Ellis, 236 Md. 487, 204 A.2d 526 (1964).

indeed a "perpetual pariah," who enters a favored highway at his peril and is negligent as a matter of law in every case. With all due respect to the court, this result has relegated the unfavored driver a status too low in any modern system of justice. He is held to a standard of conduct which may be impossible to meet.

It should be enough to place on the unfavored driver a presumption of fault. The unfavored driver should be permitted to have a jury pass upon his negligence if he can show: first, that he had no opportunity to see the favored car until the unfavored vehicle was irrevocably committed to a position of peril; second, that the favored car was operated unlawfully or carelessly; and, third, that the unfavored car could have gotten into the flow of traffic safely except for the improper operation of the favored car.[54] There is a parallel in *res ipsa loquitur* and comparable tort theories. The unfavored driver should be able to rebut the presumption of negligence, as is allowed under *res ipsa,* by showing affirmatively precise proofs of speed, time and distance, rather than general opinions.

All of this would not impose an undue burden on the court and, indeed, would give both jury and court the information which they need to determine the basic question, *i.e.,* whether the unfavored driver violated a duty to others which was within his capacity to perform. Also, it would remove the civil law from the wholly illogical position whereby absolute liability is imposed in negligence cases without regard to a standard of care.

POSITION OF THE FAVORED DRIVER

The situation of the favored driver under the Boulevard Rule is by no means so clearly defined. It would seem to follow that if the unfavored driver has an absolute duty to yield right of way, then the favored driver has an absolute right to the right of way. But the Maryland Court of Appeals has never gone this far.

In the 1939 case of *Greenfeld v. Hook*,[55] Judge Offutt found facts which raised a jury question on the liability of the favored driver under the doctrine of last clear chance. Then, in a long series of decisions, the court found the favored driver free of actionable negligence on the ground that the immediate and sole cause of the accident sued on was unlawful interference by the unfavored vehicle with the favored car's passage.[56] From the start, however, the court also made

54. In Goosman v. A. Duie Pyle, Inc., 206 F. Supp. 120 (D. Md. 1962), the United States District Court for the District of Maryland adopted this identical line of reasoning in a boulevard case arising from a Maryland accident. The court said that an unfavored driver cannot be held to the duty of yielding right of way to vehicles whose approach he cannot discover, and it ruled that the negligence of an unfavored driver under such circumstances shall be determined by the jury. The Court of Appeals, in Brown v. Ellis, *supra* note 53, clearly stated its unwillingness to accept this concept as Maryland law.

55. 177 Md. 116, 8 A.2d 888 (1939).

56. See, *e.g.,* Sun Cab Co. v. Cusick, 209 Md. 354, 121 A.2d 188 (1956); State v. Marvil Package, 202 Md. 592, 98 A.2d 94 (1953); Brooks v. Childress, 198 Md. 1, 81 A.2d 47 (1951); Sonnenberg v. Monumental Motor Tours, 198 Md. 227, 81 A.2d 617 (1951); Baltimore Transit v. O'Donovan, 197 Md. 274, 78 A.2d 647 (1951); Belle Isle Cab Co. v. Pruitt, 187 Md. 174, 49 A.2d 537 (1946); Shedlock v. Marshall, 186 Md. 218, 46 A.2d 349 (1946).

it clear that a favored driver might not proceed with blind indifference to the safety of others on the highway. Even in decisions that found the favored driver free of negligence as a matter of law, the court carefully reserved such a limitation on his absolution from liability. Traditionally, this limitation has been phrased in terms of last clear chance, although it has also been explained as the duty to avoid injuring another who is in a position of peril.

For a number of years after the *Greenfeld* case, there was only one decision, *Sun Cab v. Hall*,[57] where the negligence of the favored driver was considered to be a jury question. In this guest passenger case, there was direct testimony of inattention on the part of the favored driver, plus an apparent opportunity to avoid the accident if he had been looking. In distinguishing this case in a later decision,[58] the court pointed to the necessity of the combination being present to establish the necessary causal relationship between inattention and accident.

It was nearly ten years more before another case arose in which the court found the combination of inattention and ability to avoid which made the favored driver's negligence a jury issue.[59] Again, there was affirmative evidence of inattention and some slender evidence of the ability to avoid. This decision was followed immediately by *Green v. Zile*.[60] There, the court affirmed a judgment denying recovery to the favored driver based on a permissible inference of inattention from his failure to see a large tractor-trailer crossing in front of him until he was almost upon it. The tractor-trailer had to have been there for a considerable time to get as far into the intersection as it had gotten; also, there was no obstruction to his vision for several blocks. This was the first case involving deductive, as opposed to affirmative, evidence of inattention. The negligence of the favored driver, *i.e.*, whether he could have avoided the accident if attentive, was held to be a jury issue. Again, in the 1964 case of *Brown v. Ellis*,[61] the court held that the contributory negligence of the favored driver was for the jury. However, the court characterized the situation and holding as "rare" and reiterated its rule that boulevard cases "are not to be held to depend on nice calculations of speed, time or distance."

These cases certainly render questionable the weight to be given today to *Brooks v. Childress*,[62] which held the favored driver free of negligence proximately causing the accident. Decided by the same

57. 199 Md. 461, 86 A.2d 914 (1952).

58. White v. Yellow Cab Co., 216 Md. 286, 140 A.2d 285 (1957). That case affirmed the fact that a common carrier has no greater duty of care as a favored vehicle in a boulevard case than an ordinary vehicle.

59. Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).

60. 225 Md. 339, 170 A.2d 753 (1961). In a case decided almost concurrently, the court pointed out the requirement of showing both inattention of the favored driver and his ability to avoid the accident. In that case, it held that the burden of proof was not met. Zeamer v. Reeves, 225 Md. 526, 171 A.2d 488 (1961).

61. 236 Md. 487, 204 A.2d 526 (1964). To this extent, *Brown v. Ellis* concurs in the result reached by the District Court in Goosman v. A. Duie Pyle, Inc., 206 F. Supp. 120 (D. Md. 1962), concerning the negligence of the favored driver.

62. 198 Md. 1, 81 A.2d 47 (1951).

court at the same time as *Sun Cab v. Hall*,[63] it is difficult to explain, unless the affirmative evidence of inattention in the latter is the distinction. In *Brooks*, there was evidence that the truck involved was 1000 feet away when the unfavored car pulled out into its right of way. Judge Markell, dissenting, pointed out that this evidence would reasonably lead to an inference that the favored trucker was not paying attention, and that an attentive driver could have avoided the accident. This approach of Judge Markell is identical to the position of the court in later cases, such as *Brown v. Ellis*. Although the court has not so ruled, the *Childress* case therefore must be regarded as overruled to the extent that on its facts it holds a favored driver free of negligence as a matter of law. *Brooks*, however, is still authority for the proposition that excessive or unlawful speed on the part of the favored driver is not negligence.[64]

Further, no case has yet appeared where the court considered operation on the wrong side of the road to be a proximate cause of an accident. In the cases where the point has been presented, the court felt that the accident would have occurred regardless of improper road position.[65] Except for the question of speed, therefore, negligence in the form of unlawful operation by the favored driver seems still an unresolved question. His absolute freedom from actionable negligence should not be carried further.

The real false scent in the Boulevard Rule, at root, is the concept that it extends some special privilege to the favored driver. Since the legislature seeks to expedite the flow of traffic, as the argument goes, the favored driver is entitled to proceed at every intersection as if his way is clear. Judge Offutt's justification of this in *Greenfeld* is as superficially persuasive today as when it was uttered; but there is a fundamental contradiction in this reasoning.

There is certainly a definite public policy in favor of keeping traffic moving. The legislature has encouraged this by inhibiting unfavored drivers, so that they may not impede favored traffic except in violation of law; however, the statutes give no concomitant *privilege* to the favored driver. The favored driver may know, when he approaches a farm lane or a green light, that he is entitled to proceed without interference. But at highway intersections, where traffic flow and the opportunity for collision are greatest, the awareness of a traffic control

63. 199 Md. 461, 86 A.2d 914 (1952).

64. See also Zeamer v. Reeves, 225 Md. 526, 171 A.2d 488 (1961) and Davis v. Taylor, 217 Md. 84, 141 A.2d 706 (1958). It has frequently been held that negligence cannot be proven from what happened after a collision. It must be noted, however, that evidence of speed derived from post-accident data was considered material in one chain-reaction boulevard case. The case involved a violation of the boulevard law, a collision, and an attempt to avoid the collision by a second favored driver. While reciting the rule that the original violation of right of way was the proximate cause of the ultimate collision by the second favored driver, the court seemed far more concerned with evidence of his negligence than if he had been the favored driver whose right of way was actually invaded. Logically, whether the driver is the first or second favored driver in an accordion accident would seem a distinction without a difference. See Coastal Tank Lines v. Carroll, 205 Md. 137, 106 A.2d 98 (1954).

65. Sun Cab v. Cusick, 209 Md. 354, 121 A.2d 188 (1956) and Zeamer v. Reeves, *supra* note 64. It must be remembered that the racing favored driver case, State v. Gosnell, 197 Md. 381, 79 A.2d 530 (1951), did not decide that the favored driver was free of negligence, but only that the unfavored driver was contributorily negligent in failing to yield right of way.

device requiring an unfavored driver to yield right of way is almost always solely within the compass of the unfavored driver.

There is no logic in a rule which imposes different standards of care upon a driver dependent upon facts which he does not ordinarily possess. Moreover, the privilege of the favored driver under the Boulevard Rule not only involves an unknown element, but it is also itself variable. People put up traffic control devices, and people can take them down. It is not beyond possibility that a stop sign could be knocked down or taken away, and an accident occur involving someone who knew of the sign and did not know that the sign was gone. On present law, the absence of the sign would deny him the right to assume that the right of way would be yielded; thus, he would be held to a different standard of care than if the sign were there.

There is, therefore, no justification for further extension of the privilege of the favored driver into situations where he has originally been driving unlawfully or carelessly. Ordinarily, in most boulevard cases it is not material what the favored driver was doing. The accident would never have happened if the unfavored vehicle had yielded right of way, and the conduct of the unfavored driver is the sole proximate cause of the accident. But if it can be shown that the favored driver could have avoided the accident if he had been operating lawfully and with due care, then the negligence of the favored driver should be an issue for the jury. On the few recent decisions involving the negligence of the favored driver cited above, it can be argued that this is the present trend.

CONCLUSION

No one will debate the proposition that there is a public interest in expediting the flow of traffic, and there is no reason that this interest should not be reflected in automobile negligence law. At the same time, there should be an equal interest in careful operation of motor vehicles, and equal reflection of this interest in the law. Any rule of conduct must be applied by the man behind the wheel under the stress of instant decision; rules, therefore, should be simple. Common justice should balance standard of care with opportunity for judgment.

Directing this philosophy to the narrow field of boulevard law, these ends are largely achieved in so far as the unfavored driver is concerned. When the unfavored driver reaches a stop sign or a comparable situation, he should have no difficulty in ascertaining his proper course. His duty to others and his opportunity to fulfill that duty coincide; all facets of policy justify treating him harshly if he fails in his duty of yielding right of way. Injustice occurs only when he is given a duty which he cannot physically meet.

The favored driver, however, now enjoys a status that cannot be as well defended. If the policy for expediting traffic is to be applied to him, then any special privileges which he has should depend on facts which are readily apparent to him. Except for green lights and private entrances, no such test exists. It seems desirable that one should be devised. An obvious and reasonable test would be to consider the

physical nature of the highway on which he drives or the presence of highway markings which designate a major road. If a driver is on a dual highway, or on "U.S. Route No. 40," for example, he should be entitled to assume that its entrances are appropriately signed and that he is entitled to right of way. On lesser roads, he should have no comparable right of assumption and should be required to exercise a different standard of care at intersections.

Such a distinction would provide a means of effectuating the legislative purpose of traffic expedition so often recited, since it would affirmatively assist genuine arterial traffic, which presently is running in blind reliance. At the same time, it will not affect public interest in careful operation of vehicles, so long as the protection of the assumption is not extended to unlawful or careless conduct. The distinction suggested seems necessary if traffic movement is really to be expedited. As urged previously, such a distinction can be found in a close reading of the statutes.[66] The absence of such a distinction, however, may be so established that a legislative act is necessary to bring it into existence.

But, as has been stated before, the court must remove some blinders in getting at causes in boulevard cases. Speed, time and distance are material and relevant factors in determining fault in boulevard situations; in some cases, they are essential to entitle a claimant to recovery or to protect a defendant from loss where there has been no fault of his. Incompetent estimates are worthless, of course, and boulevard cases cannot degenerate into a contest of engineering experts. However, strict rules of admissibility are applied elsewhere, without difficulty, and the scintilla of evidence rule need not be sacrosanct. Both juries and, especially, the courts need every aid in deciding cases where damages so frequently are serious, and fault so frequently difficult to assess.

66. See the discussion at note 24, *supra*.